

May 12, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tri-Valley CAREs

Date of Filing: April 17, 2009

Case Number: TFA-0302

On April 17, 2009, Tri-Valley CAREs (Appellant) filed an Appeal from a determination issued to it on March 6, 2009, by the National Nuclear Security Administration Service Center (NNSA/SC) of the Department of Energy (DOE). In that determination, NNSA/SC responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. In its determination, NNSA/SC identified and released ten documents responsive to the Appellant's request. The Appellant challenges NNSA/SC's withholding of information from two of these ten documents. In addition, the Appellant challenged the adequacy of NNSA/SC's search for documents. This appeal, if granted, would require NNSA/SC to release the withheld information to the Appellant and conduct a further search.

I. Background

On October 24, 2008, the Appellant requested

the preliminary documented safety analysis, the documented safety analysis, the Quality Assurance Program, the safety management system, the technical safety requirements, the safety management program, the safety evaluation report, the safety basis for the facility, any documents relating to the unreviewed safety question process, the June 20, 2006, approval by the Livermore Site Office of the future segmentation of the Tritium Facility into two Category 3 nuclear facilities, and any other relevant documents.

Request Letter dated October 24, 2008, from Robert Schwartz, Appellant, to Carolyn A. Becknell, FOIA Officer, NNSA/SC. On March 6, 2009, NNSA/SC released seven documents in full to the Appellant. NNSA/SC redacted portions of three documents,

contending that the redacted information is exempt from disclosure under FOIA Exemption 3.^{1/} Portions of two of those documents were also withheld under FOIA Exemption 2. Determination Letter dated March 6, 2009, from Carolyn Becknell, FOIA Officer, NNSA/SC, to Appellant (Determination Letter).

On April 17, 2009, the Appellant appealed, contending that the NNSA/SC improperly justified its withholding of information under Exemption 2. Appeal Letter at 3 received April 17, 2009, from Appellant to Director, Office of Hearings and Appeals (OHA) (Appeal Letter). The Appellant claims that NNSA/SC failed to “provide a sufficient factual or legal basis to support its assertion that the requested records are within the terms of the statutory language as personnel rules or internal practices of the agency.” *Id.* The Appellant also claims that NNSA/SC failed to justify its statement that release of the information “could possibly expose this department, as well as other department/organization, to a ‘significant risk of circumvention of agency regulations or statutes.’” *Id.* at 4. The Appellant claims that the public interest in release of the information outweighs withholding, since the records do not fall under Exemption 2. *Id.* In addition, the Appellant challenged NNSA/SC’s search for documents. *Id.*

II. Analysis

A. Adequacy of the Search

In responding to a request for information filed under the FOIA, it is well established that an agency must “conduct a search reasonably calculated to uncover all relevant documents.” *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). “The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); *accord Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Glen Bowers*, Case No. TFA-0138 (2006); *Doris M. Harthun*, Case No. TFA-0015 (2003).^{2/}

We contacted NNSA/SC to determine what type of search was conducted. NNSA/SC indicated that the request was forwarded to both the Livermore Site Office (LSO) and the Lawrence Livermore National Laboratory (LLNL). LSO stated that it conducted both a computerized and hand search to recover the requested information. A senior nuclear

^{1/} The Appellant is not challenging the withholdings made under Exemption 3.

^{2/} All OHA FOIA decisions issued after November 19, 1996, may be accessed at <http://www.oha.doe.gov/foia1.asp>.

safety analyst conducted the hand search, searching “facility records as they relate to the safety basis of nuclear facilities.” E-mail dated May 5, 2009, from Shirley Peterson, NNSA/SC, to Janet R. H. Fishman, Attorney-Examiner, OHA (May 5, 2009 E-mail). LLNL indicated that it conducted a hand search because the documents are not “indexed electronically, as the project is still active.” *Id.* The search was conducted through “the project records stored on the Plant Engineering server and the project manager’s [personal computer].” *Id.* The electronic project folders were reviewed manually. *Id.* NNSA/SC searched in the areas most likely to have the requested information. Further, a person with knowledge of the subject matter conducted the search. We believe the searches that were conducted were reasonably calculated to uncover the requested information in those offices.

However, the Appellant challenged the search because the “evaluation by the Chief of Defense Nuclear Safety (CDNS) regarding the decision to approve segmentation of LLNL Building 331” was not provided. Appeal Letter at 3. LSO indicated that no formal evaluation by the CDNS was provided to LSO. May 5, 2009 E-mail. LSO continued “[a]ny evaluation provided by the CDNS to the NNSA Central Technical Authority^{3/} (CTA) to recommend approval of the exemption was not provided to LSO and would be maintained at either the CDNS office or the NNSA Headquarters.” *Id.* We believe that NNSA/SC should have also sent the request to the CTA and to the CDNS, which are both at NNSA Headquarters. For that reason, we will remand the matter to NNSA/SC for a further search of NNSA Headquarters.

B. Exemption 2

The FOIA requires that documents held by federal agencies generally be released to the public upon request. The FOIA, however, lists nine exemptions that set forth the types of information that may be withheld at the discretion of the agency. 5 U.S.C. § 552(b)(1)-(9). Those nine categories are repeated in the DOE regulations implementing the FOIA. 10 C.F.R. § 1004.10(b)(1)-(9). The DOE regulations further provide that documents exempt from mandatory disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is in the public interest. 10 C.F.R. § 1004.1. The nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*,

^{3/}The term NNSA Central Technical Authority (CTA) is used in a number of DOE directives and addressed in more detail in a NNSA Supplemental Directive. DOE Directive, “Implementation of National Nuclear Security Administration Central Technical Authority Responsibilities Regarding Nuclear Safety Requirements,” NA-1 M 410.1 (March 10, 2008). Further, the NNSA Principal Deputy Administrator is designated as NNSA’s CTA. DOE Directive, “NNSA Safety Management Functions, Responsibilities and Authorities Manual (FRAM),” NA-1 SD 411.1-1C (February 15, 2008).

424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). “An agency seeking to withhold information under an exemption to FOIA has the burden of proving that the information falls under the claimed exemption.” *Lewis v. IRS*, 823 F.2d 375, 378 (9th Cir. 1987). It is well settled that the agency’s burden of justification is substantial. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 861 (D.C. Cir. 1980) (*Coastal States*). Exemption 2 is at issue in this case.

1. Analysis

Exemption 2 exempts from mandatory public disclosure records that are “related solely to the internal personnel rules and practices of an agency.” 5 U.S.C. § 552 (b)(2); 10 C.F.R. § 1004.10(b)(2). “Exemption 2 is not limited to internal personnel rules and practices; rather, it is construed more generally to encompass documents that are used for predominantly internal purposes.” *Judicial Watch, Inc., v. Dep’t of Transp.*, No. 02-566, 2005 WL 1606915, at *9 (D.D.C. July 7, 2005). The courts have interpreted the exemption to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature (“low two” information), and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement (“high two” information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). NNSA/SC has claimed that the information at issue in the present case involves only the second category, “high two” information. The courts have fashioned a two-part test for determining whether information can be exempted from mandatory disclosure under the “high two” category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under “high two” must be able to show that (1) the requested information is “predominantly internal,” and (2) its disclosure “significantly risks circumvention of agency regulations or statutes.” *Crooker v. ATF*, 670 F.2d 1051, 1073-74 (D.C. Cir. 1981) (*en banc*).

NNSA/SC withheld portions of two documents under FOIA Exemption 2. NNSA/SC explained in its Determination Letter that the information redacted from these documents is inherently internal. Determination Letter at 2. NNSA/SC further stated that the anti-circumvention protection of Exemption 2 is applicable in this case because the information “contains critical infrastructure information, the release of which could identify vulnerabilities.” *Id.* NNSA/SC stated that “if any of the information was released that it could benefit adversaries by helping them identify possible program impacts and vulnerabilities, as well as provide them the opportunity to target these facilities.” *Id.* Thus, it is “high 2” information and exempt from disclosure under Exemption 2.

We have reviewed unredacted versions of the two documents that were released to the Appellant with information withheld under Exemption 2. The United States Court of Appeals for the District of Columbia Circuit has defined predominantly internal information as that information which “does not purport to regulate activities among

members of the public . . . [and] does [not set] standards to be followed by agency personnel in deciding whether to proceed against or to take action affecting members of the public.” *Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979) (*per curiam*) (withholding information including transportation security procedures under Exemption 2). The information that NNSA/SC withheld in this case neither regulates activities among members of the public nor sets standards to be followed by agency personnel. Accordingly, this meets the first prong of the *Crooker* test and is predominantly internal.

The information meets the second prong of the *Crooker* test as well. It is well settled that an agency need not cite a specific regulation or statute to properly invoke the “high two” exemption. *Kaganove v. EPA*, 856 F.2d 884, 889 (7th Cir. 1988); *Dirksen v. HHS*, 803 F.2d 1456, 1458-59 (9th Cir. 1986); *National Treasury Employees Union v. United States Customs Service*, 802 F.2d 525, 530-31 (D.C. Cir. 1986) (*NTEU*). Instead, the second part of the *Crooker* test is satisfied by a showing that disclosure would risk circumvention of general requirements. *NTEU*, 802 F.2d at 530-31.

Release of the information at issue in the present case could allow terrorists or other malefactors to identify vulnerabilities of the Tritium facility. Accordingly, disclosure of the information at issue risks circumvention of DOE’s efforts to comply with its statutory mandate to provide secure and safe stewardship of nuclear and other dangerous materials. *See, e.g.*, 42 U.S.C. § 2284 (statute prohibiting sabotage of nuclear facilities). Even though this Appellant may have no intention to identify vulnerabilities of the Tritium facility, if DOE were to release these documents to the Appellant under the FOIA, we would also be required to release it to any other members of the public who requested it. The Appellant argued that NNSA presented conclusory and generalized allegations about how the withheld information would risk circumvention of agency regulation. Appeal Letter at 4. We disagree. We believe that NNSA/SC explained its withholding properly. Any further information may also lead a malefactor to identify vulnerabilities. Therefore, because of the significant danger of circumvention of DOE regulatory security responsibility involved in public release, we find that the information was properly withheld under the “high two” prong of Exemption 2.

2. Segregability

The FOIA requires that “any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.” 5 U.S.C. § 552(b). Thus, if a document contains both exempt information and non-exempt information that is not otherwise exempt from release, the non-exempt information must generally be segregated and released to the requestor. We have reviewed the information that NNSA/SC redacted from the two documents. NNSA/SC was very careful with its redactions. We believe that none of the information that was redacted could be reasonably segregated.

3. Public Interest

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 1004.1. NNSA/SC claimed the release of the information would risk circumvention of DOE's efforts to comply with its mandate to provide secure and safe stewardship of nuclear and other dangerous materials. We agree. As we stated above, release of the information could allow terrorists or other malefactors to sabotage the Tritium Facility. It is therefore obvious that release of the information would not be in the public interest.

III. Conclusion

The information redacted from the two documents was properly withheld under Exemption 2. The search conducted by NNSA/SC of LSO and LLNL was reasonably calculated to uncover all documents responsive to the Appellant's request. However, we believe that the NNSA Headquarters should have also been searched. Therefore, we will grant the Appeal in part and remand the matter to NNSA/SC for a further search.

It Is Therefore Ordered That:

- (1) The Appeal filed by Tri-Valley CAREs, Case No. TFA-0302, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.
- (2) This matter is hereby remanded to the National Nuclear Security Administration Service Center, which shall conduct a further search for information in accordance with the instructions set forth in the above Decision.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 12, 2009